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From: Barnes & Thornburg, LLP on behalf of Indiana-American Water Company, Inc.
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Response to IURC's Improving Procedural Efficiencies ("IPE") 2020 Issues List

The Commission's Mission statement provides, "An advocate of neither the public nor the utilities, the Commission is required by state statute to make decisions in the public interest to ensure the utilities provide safe and reliable service at just and reasonable rates." The rules applicable to proceedings before the Commission must always have this Mission in mind.

Issues for all docketed proceedings:

Case-in-Chief Requirements:

Under the recommended issues to be considered for all docketed Proceedings, the issues list states "[t]he Petitioner should provide more information in its case-in-chief, including but not limited to:

- a. Visibly listing in the petition the estimated dollar amount and percentage increase for which cost recovery is being requested'
- b. Answers to questions asked in any pre-petition meetings with Commission staff, the Office of Utility Consumer Counselor ("OUCC"), and other potential parties; and
- c. Workpapers as Excel spreadsheets with formulas intact."

A brief review of the burden of proof in proceedings before the Commission may be helpful for framing this issue.

It is well established that the petitioning party in a proceeding before the Commission has the burden of proof at the outset of the case. Moreover, with respect to rate case proceedings, a petitioning utility by statute also bears the burden of establishing that its existing rates are now unjust and unreasonable, and require revision.¹ However, once the petitioning utility has presented a prima facie case for relief, the burden shifts, and the opponents of the requested relief, such as the OUCC and intervenors, have the burden of going forward with their evidence.² A prima facie case is "one which presents 'such evidence as is sufficient to establish a given fact and which if not contradicted will remain sufficient.'" ³ The Petitioner's obligation is "to submit 'substantial

¹ See *Re Indiana Michigan Power Co.*, Cause No. 39314 at 4, 1993 WL 602559 (IURC 11/12/1993) (citing IC 8-1-2-61 to -73).

² *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. 232, 180 N.E.2d 110, 117, 43 PUR 3d 278 (1962), citing *Cleveland, etc., R. Co. v. Miller* (1905), 165 Ind. 381, 385, 74 N.E. 509, 510 ("The general rule in Indiana is that 'a prima facie case must always stand until it is broken by the defendant's evidence.'"); also *Zakutansky v. State Bd. of Tax Comm'rs*, 758 N.E.2d 103, 2001 Ind. Tax LEXIS 40 (Ind. Tax Ct. 2001) ("Once the taxpayer carries the burden of establishing a prima facie case, the burden shifts to the State Board to rebut the taxpayer's evidence and justify its decision with substantial evidence." (quoting *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1233 (Ind. Tax Ct. 1998))).

³ *Re Indiana Michigan Power Co.*, Cause No. 39314 at 4, 1993 WL 602559 (IURC 11/12/1993); *Plough v. Farmers State Bank of Henry County*, 437 N.E.2d 471, 475 (Ind. Ct. App. 1982); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630, 633 (Ind. Ct. App. 1980); *Rene's Restaurant Corp. v. Fro-Du-Co Corp.*, 210 N.E.2d 385, 387 (Ind. Ct. App. 1965).

evidence’ sufficient for a prima facie case, not to satisfy a ‘clear and convincing’ or ‘beyond a reasonable doubt’ standard.”⁴

The objective in all proceedings before the Commission should be to decide each case on the merits. Any other objective risks the Commission’s decisions becoming less predictable, resulting in Indiana being looked on less favorably in the industry from a regulatory perspective, and ultimately causing investment in Indiana to decline to the detriment of all Hoosiers.

The statement in the 2020 IPE Issues list that “more information” is needed in a petitioning utility’s case-in-chief should be refined to specify what types or pieces of additional information the Commission considers necessary. Some of this can be addressed in the proposed revisions to the MSFRs as discussed below. But for any proceeding before the Commission, to the extent specific types or pieces of information are considered necessary, that requirement should be stated in the rules. This is not to say that the utility does not still bear the burden of presenting a prima facie case; but if there are specific items the Commission is going to deem necessary for a prima facie case, that should be made known to all.

While the provision of multiple additional schedules, workpapers and supporting documentation is not without expense, if they are required by the rule, and the required information is clearly delineated therein, the utility can provide them and avoid procedural machinations over whether the Petitioner’s case-in-chief is sufficient, allowing the Commission to get to the merits more efficiently. As will be discussed below with respect to rate case proceedings specifically, the repercussion for filing an insufficient case-in-chief is a delay in the schedule until a complete case-in-chief has been filed. This existing process, allowing the Commission Staff and all parties to review the Petitioner’s filing and note deficiencies, with opportunity for cure, should be preserved. A similar structure imposing a specified period for objection to deficiencies in the case-in-chief potentially could be useful in non-rate case proceedings. It also may be worthwhile to consider building in a mechanism for the Commission to identify those areas where it requires more information *after* reviewing the Petitioner’s case-in-chief. While this ability currently exists via docket entry questions and technical conferences, providing some timelines for when these initial inquiries can be expected might achieve further efficiencies.

The Advocacy Process:

In determining what level of detail is needed in various proceedings (*i.e.*, what “more information” means), it may be useful to consider that there is an element of advocacy by all parties appearing in proceedings before the Commission. It may be that not all components will need to be studied in greater detail by Commission staff. Rather, once the Petitioner has made its prima facie case, the OUCC and other intervenors have carried their burden of going forward with their evidence,

⁴ *Re NIPSCO*, Cause No. 43526 at 76, 2010 WL 3444546 (IURC 8/25/2010). The Commission in *I&M Cause 39314* described the “substantive legal standard generally applicable to I&M for meeting its burden for inclusion of expenses in its revenue requirement for ratemaking purposes is evidence that the expense levels proposed are neither unreasonable nor excessive [and] it is incumbent upon I&M to furnish some data supporting the propriety of a given level of revenue or expense, particularly with I&M specific information.” *Re Indiana Michigan Power Co.*, Cause No. 39314 at 5, 1993 WL 602559 (citing IC 8-1-2-48).

and the Petitioner has had the opportunity to explain or rehabilitate its position and rebut arguments made by the other parties, the Commission should have before it the universe of disputed issues to decide. When combined with any uncontradicted evidence, the Commission will have the record needed to make its reasoned findings. We should expect the OUCC and ratepaying intervenors to dive more deeply into the testimony and workpapers and MSFRs and conduct discovery, perhaps in writing and perhaps via deposition. The purpose of the discovery is to identify the particular issues on which the Commission needs to focus. The Commission should be able to trust the advocacy process to narrow the issues for which it needs more information.⁵ The sworn testimony and analysis presented by the Petitioner should not be permitted to be overcome by opposing testimony that argues merely that the Petitioner's case-in-chief is not sufficient. Such a focus is designed to avoid the merits.

Technical Conferences:

Technical conferences play a key role in this as well, allowing Commission staff to confer in real time with the parties without concerns over ex parte communications. These face to face (or virtual face to face) meetings can be one of the most efficient settings in which to exchange valuable information.

Proposed Orders:

The proposed orders can also serve to narrow the issues for the Commission to decide. We agree that new evidence must not be permitted to be introduced at this stage. It is likely, however, that legal arguments will be fleshed out for the first time in post-hearing filings. Oral argument is uncommon in Commission proceedings. To the extent the purpose of this section of the 2020 IPE Issues List is to ensure that the proposed order is presented in a format that can serve as the base of a document the Commission can actually use to issue its findings and orders, perhaps the best approach is to ask that legal arguments be made in post-hearing briefs.

Issues for Rate Case Proceedings:

MSFRs and Forward-Looking Test Years:

We agree the MSFRs need to be revised to contemplate forward-looking test years under IC 8-1-2-42.7. Any of the additional information the Commission deems requisite for rate case proceedings in particular should be articulated within the revised MSFRs.

Failure to File Complete Case-In-Chief:

As for the timeline for review of the information filed under the MSFRs and the consequences of failure to file the required information, as noted earlier this is already a part of the current MSFR construct. Parties have 20 days to file their notice that a utility has failed to comply with the MSFRs. If a deficiency exists, the utility has not filed a complete case in chief until the deficiency

⁵While the Commission may weigh the evidence, it may not refuse to consider competent, uncontradicted evidence and make reasoned findings upon it. *Hancock Rural Tel. Corp. v. Public Serv. Comm'n*, 137 Ind. App. 14, 201 N.E.2d 573, 588 n.1 (Ind. Ct. App. 1964) (en banc), reh'g denied 203 N.E.2d 204 (Ind. Ct. App. 1964).

is corrected. The timeline under IC 8-1-2-42.7 then begins to run. Care must be taken that the advantages created for Indiana by adoption of Section 42.7 are not eroded by extension of the time for review and potential injection of uncertainty over the timing of rate relief in our state. The General Assembly's call for prompt review of rate requests under the statute should not be jeopardized by rules creating incentives for parties to "find" deficiencies and thus delay the utility's requested relief.

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